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No. 00-577

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

UNIVERSITY OF CINCINNATI, *et al.*,

Petitioners,

v.

JOHN B. JOHNSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Not one of the three issues ostensibly raised in the Petition is actually presented by this case. Indeed, the First Amendment issue raised by Petitioners, which they characterize as a "well-developed conflict among the courts of appeals," was never raised by the Petitioners below, nor was it passed upon by the District Court or the Sixth Circuit. Moreover, the Sixth Circuit's decision applies established principles to the factual record. A grant of certiorari, therefore, would not resolve any dispute among circuit courts of appeals, nor provide needed guidance to lower courts in applying well settled modes of analysis in Title VII, Section 1981 or First Amendment litigation.

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SUMMARY OF THE ARGUMENT

Certiorari is not warranted because the three issues raised by Petitioners are not, in actuality, presented by this case. In their effort to create issues where there are none, Petitioners misstate the nature of Respondent's claims and the factual record, and they mischaracterize the Sixth Circuit's decision.

A. First Amendment.

The Courts of Appeals are not sharply divided over the proper application of *Pickering* in public employee First Amendment speech cases. The law applicable in such cases is well established, and it was properly applied in this case. The absolute rule proposed by Petitioners, which is advanced for the first time in the Petition, has been consistently rejected by courts in deference to the *Pickering* balancing test.

Petitioners would have the Court insulate public bodies and their principals from accountability for speech designed to encourage or obtain compliance with their own rules and policies. Indeed, Petitioners' rule would authorize the punishment of those public officials who are duty bound to seek compliance with such guidelines. According to Petitioners, their categorical rule would permit the discharge of public employees for speech even in cases such as this where concerns about compliance were expressed *internally* by the very employee whose duties necessarily included ensuring such compliance, even in the absence of any evidence that such speech in any way hindered the employer's operation.[1]

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1. Indeed, the record in this case reflects that Petitioners have steadfastly denied that Mr. Johnson's speech played any role in his termination. To the contrary, Petitioners argued to the District Court and the Court of Appeals that Mr. Johnson's "inattentiveness" and "bungled efforts" at labor negotiations caused his termination.

B. Opposition to Discrimination.

Petitioners are similarly disingenuous when, as their second ground for Certiorari, they contend that the Sixth Circuit incorrectly applied Title VII and 42 U.S.C. § 1981 because, in Petitioners' words, "Johnson does not allege that any conduct he opposed was a violation [of said provisions]." (Petition p. 19). Petitioners' entire argument on this issue is premised upon a misrepresentation of the record (*i.e.*, that the only act for which Johnson was retaliated against was his generalized advocacy of affirmative action principles).

In truth, the record reflects that Respondent complained about what he perceived as unlawful discrimination on several specific occasions. For example, in one instance Respondent was told by the University's President, Petitioner Steger, that no consideration would be given to a black dean whom Respondent had suggested for a provost position because "we already have two black vice presidents, I can't bring in a black provost." Respondent's opposition to such blatant discrimination cannot be fairly characterized as, in Petitioners' words, "advocacy of affirmative action." Respondent opposed conduct made unlawful by Title VII and § 1981 (*i.e.*, the direct consideration of race as a factor in promotion decisions). Accordingly, the theoretical issue raised by Petitioners is not presented by this case.

Petitioners' argument is also troubling because they fail to appreciate that the conduct they characterize as "advocacy of affirmative action" includes legally protected opposition to perceived unlawful conduct. After several years at his job, Respondent Johnson became aware that minorities employed by the University of Cincinnati were overwhelmingly concentrated in the lower ranks. Respondent suspected that

the failure to hire minorities in middle and higher level positions might be due to the fact that the hiring process prescribed by the University's Affirmative Action Plan was routinely waived by the administration, and he feared that the pervasive use of such waivers was providing cover for unlawful hiring practices. As a consequence, Respondent opposed such practices by seeking to limit the use of waivers. Such conduct, while it could arguably constitute "advocacy of affirmative action," still constitutes opposition to what Mr. Johnson perceived as unlawful employment discrimination.

C. Participation in EEOC Process.

Finally, Petitioners blatantly misrepresent the allegations of Respondent's EEOC charge to support their argument that he may not maintain a Title VII claim for retaliation he experienced as a result of filing that charge. According to Petitioners, Respondent charged "that the University had violated Title VII by diminishing his influence because he advocated greater efforts at affirmative action." (Petition p. 25). Petitioners contend that, *as a matter of law*, Respondent Johnson could not have reasonably believed such an allegation would support a Title VII claim, and thus he was not protected from retaliation for filing such a charge. In truth, Respondent's EEOC charge alleged that he was retaliated against for "making an internal complaint about the selection process for the position of Chief Operating Officer for the hospital," which complaint is characterized in the charge as one of "unlawful racial bias." Significantly, Petitioners chose to omit from their Appendix a copy of Respondent's EEOC charge, which was an exhibit to the Complaint in this action. Respondent complained about what he reasonably perceived to be unlawful employment

discrimination and retaliation for opposing it. Under well established law, a retaliation claim may be premised upon such a charge.

STATEMENT OF THE CASE

At the outset, Petitioners state in sweeping language that Petitioner "claims that he was dismissed because he advocated more vigorous implementation of the University's affirmative action policies." (Petition "Questions Presented"). But "to generalize is to omit", and, unfortunately in this case, to misrepresent.[2] It is therefore necessary to provide a limited recitation of the facts and history of this case.

A. Facts.

Respondent, John B. Johnson, is an African-American. He was hired by the University of Cincinnati as its Vice President of Human Resources and Human Relations ("VPHRHR") on August 1, 1993, following a national search. As a primary goal of his position, the University charged Mr. Johnson with the responsibility for making UC a "place of respected diversity and free from racism" (Complaint ¶ 12, App. 94a). One of his many duties was to oversee the operation of the University's affirmative action office. One function of that office was to review all proposed new hires to ensure consideration of qualified minorities (the "A-900" form process). (App. 4a). Mr. Johnson also served on the President's Advisory Council on Race Relations and Human Decency, a group charged with examining issues of race relations at the University.

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2. *See* Justice Holmes writing in *Donnell v. Herring-Hall-Marvin Safe Co.*, 208 U.S. 267, 273 (1908).

Mr. Johnson became concerned that discriminatory hiring practices were going undiscovered through the pervasive use of waivers to avoid the A-900 process. (App. 6a). In a letter to UC's cabinet dated July 21, 1994, entitled "Is there an Affirmative Action Commitment?", Mr. Johnson warned that continued overuse of waivers might lead to future investigations.[3] According to one long-time University administrator, A-900 waivers may be used as a tool for masking discriminatory hiring decisions. (App. 124a). Mr. Johnson also expressed concern to University President Steger about what he perceived as widespread pay disparities for lower level African American employees.[4]

Mr. Johnson raised additional concerns about unlawful discrimination in reference to several hiring decisions. For example, when a senior executive officer was sought for University Hospital, Mr. Johnson advocated for a minority candidate whom he considered more qualified than the white male ultimately selected. (App. 7a). Subsequently, when a new chair of the Department of Surgery was being selected, Mr. Johnson objected to the granting of a waiver of the A-900 process so that a white friend of Petitioner, Dr. Harrison, could be hired without consideration of other candidates.

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3. As explained at length in the Sixth Circuit's decision, UC's affirmative action plan was originally implemented pursuant to a Conciliation Agreement with the Office of Federal Contract Compliance Programs (OFCCP) following findings of repeated violations of Executive Order 11246. (App. 3a-5a). As feared by Mr. Johnson, an OFCCP audit of UC revealed numerous additional violations. (App. 6a n.1). On November 18, 1994, the OFCCP advised UC President Dr. Steger that it had found race and sex salary disparities as well as reporting violations. (App. 125a).

4. At Mr. Johnson's suggestion, a study of this problem was undertaken but terminated early by Dr. Steger.

Mr. Johnson wrote to Dr. Steger protesting the waiver and questioning the University's commitment to providing equal employment opportunities. (App. 8a). Similarly, when a new University provost was being sought, Mr. Johnson recommended consideration of Dean Castenell, an African American who had served UC for many years. In response, Dr. Steger remarked, "we already have two black vice presidents, I can't bring in a black provost . . . the faculty would kill me if I would bring in a black provost . . ." (App. 27a).

Ultimately, Mr. Johnson came to believe that he was being marginalized because of his protests over what he perceived to be discriminatory hiring practices. Accordingly, on December 5, 1995, Plaintiff filed an EEOC charge against the University. (App. 11a). Contrary to the claims in the Petition, Mr. Johnson's EEOC charge did not simply allege that he was being "obstructed in his efforts to promote affirmative action." (Petition p. 3). Rather, Mr. Johnson pointedly alleged that he was experiencing retaliation for "his complaints concerning the selection process for the hospital's chief operations officer position and his complaints concerning disparities in hiring and pay for minority employees . . ." (Amended Complaint ¶ 24, App. 98a). Six weeks after he filed his EEOC charge, Plaintiff's employment was terminated. (App. 12a; Amended Complaint ¶ 27, App. 99a).

B. District Court Proceedings.

Mr. Johnson filed this lawsuit in June 1996 claiming, among other things, that his termination was unlawful employment discrimination and retaliation for protected speech and activity in violation of Title VII, 42 U.S.C. § 1981, and the First Amendment. (App. 90a-104a).

Petitioners moved for summary judgment. With respect to Mr. Johnson's First Amendment retaliation claim, the Petitioners' sole argument in support of summary judgment was that "Johnson has submitted no evidence in opposition to the instant motion which would permit a reasonable jury to find that [his speech] was a 'substantial' or 'motivating' factor in the University's decision to relieve him of his duties."

In disposing of the claims pertinent to the instant Petition, the District court held that:

1. Mr. Johnson may not maintain a claim for unlawful discrimination in violation of Title VII because he is not a member of a protected class by virtue of his advocacy on behalf of minorities and/or women. (App. 76a).

2. Mr. Johnson could not have reasonably believed that he was engaging in protected activity when he filed his EEOC complaint. (App. 79a).

3. Mr. Johnson's speech was disruptive to the University's operation such that the government's interest outweighed his. (App. 85a-86a).

The District Court never addressed whether Mr. Johnson's position as Director of Human Resources and Human Relations impacted its analysis of his First Amendment claim. Thus, Petitioners did not advance the issue they seek to raise in their Petition, and, as a result, the District Court did not pass upon that issue.

C. Appeal to the Sixth Circuit.

Mr. Johnson appealed the District Court's ruling insofar as it dismissed his Title VII retaliation and discrimination

claims, his discrimination claim under 42 U.S.C. § 1981, and his claim under 42 U.S.C. § 1983 alleging unlawful retaliation under color of state law for engaging in speech protected by the First Amendment. In his appellate brief, Mr. Johnson argued at length that the District Court erred in its application of the doctrine established in *Pickering v. Board of Education*, 391 U.S. 563 (1968).

In response, Petitioners again argued only that there was no evidence from which Mr. Johnson could establish that his speech was a substantial or motivating factor in the University's decision to release him. Petitioners' brief to the Sixth Circuit cited neither to *Pickering* nor to any of the decisions they now advance in support of their contention that this case presents an opportunity to resolve a split among the Circuits over whether so called "policymakers" may maintain First Amendment free speech claims. The Sixth Circuit reversed the District Court's dismissal of Mr. Johnson's Title VII, Section 1981 and First Amendment claims.[5]

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5. Contrary to Petitioners' contention, the Court of Appeals did *not* hold that "Title VII and Section 1981 both provide a cause of action for an employee who alleges that his employer discharged him for advocating that the employer increase its affirmative action efforts." (Petition p. 5). Instead, following the long line of cases recognizing discrimination claims based upon the claimant's *affiliation* with someone whose race offends an employer, the Court of Appeals recognized that "the fact that Plaintiff has not alleged discrimination because of *his* race is of no moment inasmuch as it was a racial situation in which Plaintiff became involved — Plaintiff's advocacy on behalf of women and minorities in relation to Defendant's alleged discriminatory hiring practices — that resulted in Plaintiff's discharge . . ." (App. 21a).

The Court of Appeals noted that the Petitioners' rationale, which was adopted by the District Court, would enable employers "inclined to engage in invidious discrimination," to hire affirmative action officials to give the erroneous public impression that they oppose employment discrimination, secure in the knowledge that they could legally retaliate against such officials if they do the job they were ostensibly hired to perform. The Court of Appeals was quick to condemn such an approach as inconsistent with the purposes of Title VII and Section 1981, and as the kind of thinking that "turns back the hands of time on the issue of civil rights and equality in employment." (App. 26a-28a).

The Sixth Circuit also reversed the District Court's erroneous dismissal of Mr. Johnson's Title VII retaliation claims. Despite Petitioners' statement to the contrary, the Court of Appeals did not simply hold that Mr. Johnson's protests of "perceived deficiencies regarding affirmative action" could form the basis of his opposition claim. (Petition p. 6). Rather, the Court of Appeals found, as the record reflects, that "the actions taken by Plaintiff in response to hiring decisions which he felt were discriminatory and not in line with the A-900 process were sufficient to constitute opposition under Title VII." (App. 34a).

Similarly, with respect to Mr. Johnson's claim that he was retaliated against for *participating* in protected activity (*i.e.*, filing an EEOC charge), the Sixth Circuit held that the District Court erred by resolving contested issues of fact — Mr. Johnson's motive and good faith — as a matter of law. (App. 37a).[6]

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6. As to this issue, even the dissenting member of the Sixth Circuit panel, Judge Kennedy, agreed the District Court had erred. (App. 52a).

Finally, the Sixth Circuit reversed the District Court's dismissal of Mr. Johnson's First Amendment claim holding that Mr. Johnson's speech furthered the important interest of employment equality for women and minorities, and that any detrimental impact upon the University's operation was outweighed by the advancement of such an important interest. (App. 45a-46a).

Petitioners never contended before the Sixth Circuit that Mr. Johnson's "high ranking" position as a "policymaker" somehow barred him from pursuing a First Amendment retaliation claim. Thus, it is not surprising that there is no mention in the majority or dissenting opinion of the argument that Petitioners now seek to raise before the Supreme Court.[7]

D. Motion for Rehearing En Banc.

Drawing upon Judge Kennedy's dissent, Petitioners advanced three arguments in support of their request for rehearing. First, Petitioners argued that the Panel erred when it treated Mr. Johnson as a member of a protected class because of his affiliation with minorities who were not of a *different* race than him.[8] Second, Petitioners argued, as they

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7. The suggestion at page 7 of the Petition that Judge Kennedy, in her dissent, somehow addressed this issue is incorrect. Judge Kennedy's position on Mr. Johnson's First Amendment claim clearly turned upon her finding that Mr. Johnson's speech was *not* public, but rather restricted to internal channels at the University ("Had the plaintiff presented his concerns in a public venue, my resolution of this issue would be different."). (App. 53a).

8. Petitioners advanced the notion that a claimant who is discharged because of his affiliations (*i.e.*, interracial marriage), can only maintain a claim where there is a *contrast* in races. This specious argument has apparently been abandoned.

do in support of their Petition, that Mr. Johnson's opposition to what he perceived as discriminatory hiring practices is not protected activity because, according to Petitioners, Mr. Johnson was not actually opposing discrimination, he was "advocating affirmative action."

Finally, Petitioners sought rehearing as to Mr. Johnson's First Amendment claims because all of his speech was "internal" (*i.e.*, not public), and "within the scope of his duties." According to Petitioners, this fact removed Mr. Johnson's speech from the realm of "public concern."[9] None of the cases Petitioners now cite for the proposition that Mr. Johnson's First Amendment claim should not be subjected to a balancing of interests under *Pickering* were mentioned in their supporting brief. The Court declined to rehear the case.

Thus, the issue that Petitioners contend most clearly warrants the Court's attention (the so-called "policymaker" exception), has not been previously raised in this case. As a result, neither of the lower courts had an opportunity to pass upon it. Moreover, as will be shown below, the purported "split" among the circuits over this issue is nowhere near as sharp as Petitioners suggest. Under such circumstances, review is not warranted.

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9. Petitioners have apparently abandoned this argument as well, recognizing that under well established precedent purely "internal" speech can form the basis of a First Amendment claim. *See, e.g.*, *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410, 413-17 (1979). Indeed, Petitioners contend in footnote 13 that, under the rule they propose, it is irrelevant whether the speech at issue is internal or external.

REASONS FOR DENYING THE WRIT

This case does not present a single issue worthy of the Court's attention. Petitioners' primary argument, that there is a split among the circuits, was neither raised nor considered below. It would make little sense to address such a purported circuit split in a case where the Court of Appeals did not recognize or consider the competing arguments because it was never asked to do so. Petitioners' claim that the Sixth Circuit recognized a Title VII and Section 1981 claim for "advocacy of affirmative action" is simply false, and, as such, does not merit review. Petitioner's final claim, that Mr. Johnson could not have believed his EEOC charge was warranted, is merely an attack on the Sixth Circuit's proper application of summary judgment methodology.

A. Review of issues neither raised nor passed upon below is strongly disfavored.

It is well established that, "[w]here issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 148 n.2 (1970). Only in "exceptional cases" is consideration of issues never raised or passed upon below appropriate. *Youakim v. Miller*, 425 U.S. 231, 234 (1976). Even then, the scope of review may be curtailed in order to afford the lower courts an opportunity to consider such issues. *Id.* (remanding to district court to consider conflict between state and federal statute not previously raised). Finally, review of such questions may be difficult or impossible if the factual record, developed without thought to such unraised issues, is insufficient.[10]

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10. *See United States v. Mendenhall*, 446 U.S. 544, 552 n.5 (1980) (undertaking review of unraised question based on finding of adequate evidentiary record).

This is not an "exceptional" case. The Court has provided guidance on the issue raised by Petitioners on several occasions, and the contention that there is a split among the circuits is predicated entirely upon an inflated interpretation of cases dealing with political patronage.[11] Even assuming that the issue raised for the first time on appeal by Petitioners is worthy of resolution by the Court, this case is not an appropriate opportunity for such review. Petitioners contend that, with respect to First Amendment speech claims by high level "policymakers," there "should be no particularized balancing of competing interests." (Petition p. 11). The applicability of Petitioners' proposed rule then turns upon whether Mr. Johnson was a "policymaker" or "high level officer" within the meaning of the proposed rule. While one might assume from Mr. Johnson's title that he would fit within such a category were it to be created, the factual record was never developed with this issue in mind, nor did the District Court or the Court of Appeals grapple with the record with respect to this issue.

The political patronage cases upon which Petitioners rely clearly provide that "the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti v. Finkel*, 445 U.S. 507, 518 (1980). Translating this principle to the rule espoused by Petitioners,

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11. To the extent Petitioners claim that the Sixth Circuit has chosen a side in the alleged division between the circuits in its decision in this case, they are mistaken. It defies imagination how a court of appeals that was not asked to address an issue, and therefore did not address an issue, can be said to have resolved that issue.

it would appear incumbent upon Petitioners to *demonstrate* that a limitation upon Mr. Johnson's speech was "an appropriate requirement for the effective performance" of his position. Because Petitioners never advanced their new argument below, they never made such a showing. Instead, they ask the Court, contrary to the decisions upon which they rely, to assume such facts. As a result, any review of this case with respect to the First Amendment issue now raised by Petitioners for the first time, would be purely advisory, necessitating a remand for further development and consideration of the factual record.

B. There is no need for the Court to revisit its decision in *Pickering* or its progeny.

1. *The Court's precedents have provided ample guidance on this issue.*

Petitioners contend that the Court's decisions involving First Amendment speech claims have left unresolved the issue of whether the judiciary may employ a "categorical" rule akin to that established in *Branti* with respect to claims brought by high level employees. (Petition p. 10). To the contrary, the Court has clearly indicated that such bright lines cannot be drawn in speech cases. In *Connick v. Myers*, 461 U.S. 138 (1983), the Court reiterated the following language of the *Pickering* court:

> Because of the enormous variety of fact situations in which critical statements by . . . public employees may be thought by their superiors . . . to furnish grounds for dismissal, we do not deem it either appropriate or feasible to lay down a

> general standard against which all such statements may be judged.

Connick, 461 U.S. at 154 (ellipses in original).[12]

Four years later the Court ruled that the nature of an employee's responsibilities is a factor to consider when balancing interests under *Pickering*.

> [I]n weighing the State's interest in discharging an employee based on any claim that the content of a statement made by the employee somehow undermines the mission of the public employer, some attention must be paid to the responsibilities of the employee within the agency. The burden of caution employees bear with respect to the words they speak will vary with the extent of authority and public accountability the employee's role entails.

Rankin v. McPherson, 483 U.S. 378, 390 (1987)).[13]

12. *See also United States v. Nat'l Treasury Employees Union*, 513 U.S. 454 (1995), noting that government's burden under *Pickering* to support "wholesale" deterrent to broad category of speech is even greater because *Pickering* and its progeny were designed to address actual individual speech.

13. Significantly, the *Rankin* Court rejected a categorical rule advanced by the public employer during oral argument which would have insulated the employer from liability for firing deputized employees due to their speech. *Id.* at 391 n.7. The *Rankin* Court also noted that there is no categorical rule that low level employees may not be terminated for the content of their speech. *Id.* at 391 n.18. *See also O'Hare Truck Svce., Inc. v. City of Northlake*, 518 U.S. 712, 719 (1996), distinguishing political affiliation and patronage cases involving "raw test of political affiliation" (*i.e.*, *Branti* and *Elrod v. Burns*, 427 U.S. 347 (1976)), from speech cases in which "the balancing *Pickering* mandates will be inevitable."

Petitioners urge the Court to adopt a rule granting public employers free reign to terminate high level employees for their speech on matters of policy, regardless of whether such criticisms are made internally or externally or whether such speech is, as in this case, integral to the performance of the employee's duties. There is no reason to consider such a baseless argument. As the Court noted in *Waters v. Churchill*, 511 U.S. 661, 664 (1994), "[g]overnment employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions." Petitioners would have the Court abandon such principles entirely and gag policymakers from debating policy, internally and externally. Under such Orwellian restrictions on speech by public employees, government practices may proceed "efficiently," but without the benefit of any debate whatsoever by, or even among, those employed to make and enforce policies. First Amendment rights are closely guarded to prevent just such results.[14]

2. *There is no clear "split" among the circuits.*

Petitioners contend that the D.C., First, Seventh and Ninth Circuits have all held that "there should be no particularized balancing of competing interests" with respect to speech by public employees holding "policy-level" positions, and that the Second, Fifth and Tenth Circuits have disagreed. (Petition pp. 11-12). A review of the cases cited by Petitioners, and the progeny thereof, reveals that this is a misstatement of the law.

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14. *See Pickering*, 391 U.S. at 573 ("The public interest in having free and unhindered debate on matters of public importance — the core value of the Free Speech Clause of the First Amendment.").

In the case most forcefully argued by Petitioners, *Hall v. Ford*, 856 F.2d 255 (D.C. Cir. 1988), the Court of Appeals did undertake to refine the *Pickering* test as it relates to policy-making public employees. However, in no way did the Court suggest that it was disposing of the ultimate need to balance the employee's speech interest against the government's interests as mandated by *Pickering*. Rather, the Court prescribed several steps by which those interests can be balanced:

> We will ask first whether the employee's position relates to an area as to which there is room for principled disagreement on goals or their implementation. In other words, is it a policy area? If so, we then ask whether the office gives the employee broad responsibilities with respect to policy formulation, implementation, or enunciation. Put differently, was the individual a policy level employee? **If both criteria are met, we ask whether the government interest in accomplishing its organizational objective through compatible policy level deputies is implicated by the employee's speech.**

Id. at 264 (emphasis added). The D.C. Circuit's decision in *Hall* cannot be fairly characterized as the departure from *Pickering* suggested by Petitioners. The final analysis prescribed by *Hall* is still a balancing act. Indeed, in affirming the district court in *Hall*, the D.C. Circuit found that it "rightly concluded that . . . the government's interest in the effective functioning of its enterprise outweighed Hall's interest in speaking on a matter of public concern." *Id.* at 264.

The same is true of the other decisions cited by Petitioners. In *Flynn v. City of Boston*, 140 F.3d 42 (1st Cir.), *cert. denied*, 525 U.S. 961 (1998) the Court first held that the plaintiffs, an agency director and an operations director, could be terminated because of their political affiliations under the *Branti* and *Elrod* line of decisions following a change in the City's administration. *Id.* at 45. Noting the need to balance employees' speech interests against government employers' interests, the court went on to hold that the plaintiffs' speech "did bear on the job and their working relationship" such that plaintiffs' interests were outweighed. Finally, the court was careful to point out that its decision "does not mean that anything goes for policy-related positions", implicitly preserving the balancing test mandated by *Pickering*. *Id.* at 47.[15]

Similarly, the Ninth Circuit has not, as Petitioners claim, adopted a categorical rule for policymakers. In *Weisbuch v. County of Los Angeles*, 119 F.3d 778 (9th Cir. 1997), the case cited by Petitioners, the Court responded at length to criticism from a dissenting judge about performing the *Pickering* balancing test on the basis of the pleadings without further factual development. *Id.* at 783 n.1. Nowhere did the *Weisbuch* majority proclaim that it had adopted a rule abrogating the necessity of *Pickering* balancing; rather, the

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15. A subsequent First Circuit decision not alluded to by Petitioners confirms this reading of *Flynn*. "We held that Flynn's interest in free speech, and the public's, were outweighed by the government's interest in promoting efficiency of its services, specifically the effect of the statements on those close working relationships for which personal loyalty and confidence are necessary." *Padilla-Garcia v. Rodriguez*, 212 F.3d 69, 79 (1st Cir. 2000). Clearly, the First Circuit has not abandoned the balancing test required by *Pickering* as suggested by Petitioners.

court reaffirmed that it believed the pleadings enabled it to perform the required analysis. *Id.*[16]

Of the Circuits identified by Petitioners, only the Seventh Circuit has actually announced a "policymaker" exception to the *Pickering* analysis. However, in a recent decision not discussed by Petitioners, the Seventh Circuit made it clear that its exception is limited to those situations where termination could be justified under the *Branti* and *Elrod* line of cases. "The policymaking employee exception does not immunize public employer action unconnected to and unmotivated by need for political loyalty." *Bonds v. Milwaukee County*, 207 F.3d 969, 979 (7th Cir. 2000). In *Bonds*, Milwaukee County withdrew a job offer to the Plaintiff after he was publicly critical of a policy of the City of Milwaukee, by which he was then employed. The Seventh Circuit reasoned that "[t]he policymaking employee exception does not apply to the recision of Bond's job offer because the County did not withdraw its offer for 'political reasons,' and *Pickering* balancing thus applies." *Id.* at 979.[17]

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16. In a subsequent decision involving a high ranking official in Washington State's Office of the Commissioner of Insurance, the Ninth Circuit again made no effort to announce a categorical rule such as that advocated by Petitioners; rather the court considered the plaintiff's high level position as a pertinent factor to be weighed in applying *Pickering*. *Moran v. State of Washington*, 147 F.3d 839, 849 (9th Cir. 1998) ("The fact that Moran occupied the post of Deputy Commissioner, a policymaking position, also weighs in favor of [the] Commissioner.").

17. District Court's within the Seventh and First Circuits have recently minimized or rejected the preclusiveness of the so called "policymaker" exclusion. For example, in *Malone v. Indianapolis Housing Agency*, 102 F. Supp. 2d 1038, 1043 (S.D. Ind. 2000), the (Cont'd)

Petitioners' hyperbolic reading of the cases cited in support of the rule they propose is perhaps best illustrated by their citation to *Nelson v. Pima Community College*, 83 F.3d 1075 (9th Cir. 1996), which they characterize as "noticeably similar" to the instant case. (Petition p. 14 n.9). The Plaintiff in *Nelson* (an affirmative action director) was fired after admittedly issuing orders to staff members in direct contradiction to directives from her superiors. Applying the *Pickering* test, the court reasoned that "an employee's interest in giving unauthorized and insubordinate orders could rarely if ever outweigh her employer's interest in promoting the efficiency of public services . . ." *Id.* at 1081. The instant case is nothing like *Nelson*. There is no allegation in the record that Mr. Johnson engaged in any of the outrageous behavior attributed to the Plaintiff in *Nelson*, and Petitioners do not even contend that Mr. Johnson was ever insubordinate. More important, the *Nelson* court made no mention of the rule proposed by Petitioners or any split among the circuits. Rather, it employed the same balancing test as the Sixth Circuit did in this case. Contrary to the arguments in their brief, Petitioners do not prefer the law applied in *Nelson*, they prefer the facts.[18]

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court noted in response to defense arguments comparable to those advanced by Petitioners that "just because an employee is a policymaker, she does not lose entirely her right to free speech. . . . the plaintiff's politics must be implicated in the discharge." (citations omitted). *Parks v. City of Brewer*, 56 F. Supp. 2d 89, 99 (D. Me. 1999) ("Defendants are not relieved of their burden to demonstrate that [plaintiff's] statements disrupted governmental function simply because Plaintiff was a high level policymaker.").

18. *See also Nunez v. Davis*, 169 F.3d 1222 (9th Cir. 1999) (employing *Pickering* balancing test with respect to supervisory employee's speech contradicting superior on matter of policy).

Review of the cases cited by Petitioners from the Second, Fifth and Tenth Circuits reveals little actual disagreement with the decisions discussed above. In *Lewis v. Cohen*, 165 F.3d 154 (2d Cir.), *cert. denied*, 120 S. Ct. 70 (1999) the Court of Appeals reversed a $2,000,000 award for the terminated chief of a unit of the Connecticut lottery based upon the court's application of the *Pickering* test. In reaching its conclusion that the state's interest outweighed the employee's interest in his speech, the court gave significant, but not determinative, weight to the fact that the plaintiff/ employee was a high level official:

> [T]he *Pickering* balance is affected by the nature of the disciplined employee's responsibilities. The more the employee's job requires confidentiality, policymaking, or public contact, the greater the state's interest . . . The policymaking status of the discharged employee is very significant in the *Pickering* balance, but not conclusive.

Id. at 162 (citations omitted). Similarly, in *Kinsey v. Salado Indep. Sch. Dist.*, 950 F.2d 988 (5th Cir. 1992), the Fifth Circuit affirmed summary judgment dismissing the plaintiff's First Amendment claim reasoning that "in light of his high-level policy-maker and confidential position, Kinsey stepped over the line." *Id.* at 996. The same is true of *Barker v. City of Del City*, 215 F.3d 1134, 1138 (10th Cir. 2000), in which the court cited with approval the Seventh Circuit's decision in *Bonds v. Milwaukee County* for the proposition that "an employee's status as a policymaker bears considerable attention when weighing the interests of the government."[19]

19. *See also Curtis v. Oklahoma City Public Schools*, 147 F.3d 1200, 1213 (10th Cir. 1998) ("The employee's burden of caution is greater when the employee serves in a confidential, policymaking, (Cont'd)

Thus, regardless of the circuit in which a case is brought, the courts uniformly accord substantial weight to the level of an employee's position when considering the balancing test established in *Pickering*. This does not constitute a "sharp" split among the circuits as suggested by Petitioners. Had Petitioners ever contended in the lower courts that Mr. Johnson's high level position should have had some bearing upon consideration of his First Amendment claim, the courts would have been obliged to conduct such an analysis under the precedent discussed above.[20] However, Petitioners chose to never raise such issues in the lower courts, preferring instead to contend that Mr. Johnson's speech was not a

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or public contact role . . ."). Although not mentioned by Petitioners, the Fourth Circuit has also given significant, but not determinative, weight to a public employee's high level status. *See McVey v. Stacy*, 157 F.3d 271, 278 (4th Cir. 1998).

20. We note with some disbelief Petitioners' contention that the Sixth Circuit "rejected the University's argument . . . that it was inherently disruptive to have the University's senior personnel officer disagreeing with the President over how best to implement the University's affirmative action plan." (Petition p. 16). Our review of Petitioners' filings with the lower courts did not reveal such an argument being advanced by Petitioners. Moreover, as a practical matter it seems silly to suggest that Mr. Johnson could be fired for the act of *disagreeing* over the implementation of the affirmative action plan he was charged with administering. Had he actually *failed* or *refused* to implement it in the manner ultimately directed by his superiors, then his speech might arguably be considered disruptive. However, providing input on the most effective and proper way to implement such a plan was part and parcel of the reason for employing Mr. Johnson and his expertise. The public would hardly be served by employing a cadre of highly trained experts who are subject to termination if they suggest *internally* that a policy might better be pursued in a different manner.

substantial or motivating factor in the decision to terminate his employment. Indeed, Petitioners offered a completely different explanation for Mr. Johnson's termination (*i.e.*, allegedly bungled labor negotiations). Petitioners should not now be permitted to introduce a new argument that they failed to raise by concocting an imagined split among the circuits.

C. The Sixth Circuit properly recognized Mr. Johnson's Title VII and Section 1981 claims.

1. *Mr. Johnson's "opposition" claim under Section 704 of Title VII is not predicated upon UC's failure to satisfactorily implement its affirmative action plan.*

Petitioners argue that "opposing an employer's deficiencies in affirmative action is not opposing an unlawful practice under Title VII." (Petition p. 18). In some instances this statement might be true; however, Petitioners again broadly and erroneously attempt to paint everything Mr. Johnson did as advocacy of "affirmative action," when in fact Mr. Johnson actively opposed what he perceived as discriminatory hiring practices and several discrete instances of discrimination.[21] In attempting to gloss over these facts by labeling them as mere "deficiencies in affirmative action,"

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21. For example, Mr. Johnson voted against the hiring of a white male for Senior Executive Officer of University Hospital, preferring an African American male candidate whom he perceived as more qualified. Similarly, Mr. Johnson objected to Dr. Harrison's efforts to circumvent the candidate review process to hire a white friend as Chair of the Department of Surgery to the exclusion of qualified minorities. Mr. Johnson also opposed the President's refusal to even consider a highly qualified African American dean for the position of Provost simply because Dr. Steger thought there were already enough black vice presidents.

Petitioners fundamentally miss the point that one way to combat discrimination is to implement the safeguards associated with an affirmative action plan, such as hiring processes that ensure decisions are not made in a way that permits the purposeful exclusion of minority candidates.[22] In many instances, Mr. Johnson's attempts to obtain compliance with the University's affirmative action plan were in fact acts of opposition to what he reasonably considered discriminatory hiring practices. Such opposition is clearly protected by Title VII. *See Parker v. Baltimore & Ohio Railroad*, 652 F.2d 1012 (D.C. Cir. 1981) (opposition to a legally permissible affirmative action plan constitutes protected activity based on good faith belief that challenged practice violates Title VII).[23]

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22. *See, e.g., Miller-Calabrese v. Continental Grain Co.*, 1997 WL 392340 (N.D. Ill. 1997), noting that

> conduct which violates Executive Order 11,246 may also violate Title VII. For example, an employer who acts to discourage the employment of members of protected groups may violate both Executive Order 11,246 and Title VII. Thus, it does not follow necessarily that an employee's duties which focus on an employer's compliance with an Executive Order concerning affirmative action is not protected by the provision. A plaintiff may allege conduct that is violative of both regulations.

23. The case cited by Petitioners, *Evans v. Kansas City School Dist.*, 65 F.3d 98 (8th Cir. 1995), *cert. denied*, 517 U.S. 1104 (1996) is inapplicable in this case. The Eighth Circuit found no evidence that the plaintiff had opposed what she perceived as a "discriminatory *employment* practice," because plaintiff opposed the district's desegregation plan. In this case, Mr. Johnson opposed what he considered to be unlawful *employment* practices (*i.e.*, discriminatory

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2. *The Sixth Circuit properly recognized Mr. Johnson's claims under Section 703 of Title VII and 42 U.S.C. § 1981 for unlawful discrimination based upon his affiliation with women and minorities.*

Petitioners again mischaracterize Mr. Johnson's arguments and the ruling of the Sixth Circuit by contending that "Johnson argued, and the Sixth Circuit agreed, that *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), supports holding employers liable under Section 1981 if they adversely treat an employee for advocating affirmative action." (Petition p. 18). The Sixth Circuit's ruling in this regard had nothing to do with "advocacy of affirmative action." In accordance with abundant authority, that court recognized that under both Title VII and Section 1981, claims may be maintained where the alleged discrimination was based upon racial animus "towards third persons with whom the individuals associate." (App. 19a).[24]

Mr. Johnson necessarily affiliated with minorities and women, and indeed he advocated on their behalf in the face of UC's discriminatory hiring practices. For example,

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hiring and wage practices). Regardless of whether such acts actually proved unlawful, Mr. Johnson's activity is entitled to legal protection. *See Berg v. LaCrosse Cooler Co.*, 612 F.2d 1041 (7th Cir. 1980) (erroneous advice to an employee that the company's pregnancy disability policy was illegal was protected); *See also EEOC v. St. Anne's Hospital of Chicago, Inc.*, 664 F.2d 128, 132 (7th Cir. 1981) ("Title VII does not apply solely to those actions which are in opposition to past unlawful practices of the employer.").

24. *See Tetro v. Popham*, 173 F.3d 988, 994 (6th Cir. 1999) (recognizing Title VII claim based upon animus towards plaintiff's biracial child), and other cases cited by Sixth Circuit (App. 19a).

Mr. Johnson proposed an African American candidate, a dean of long standing, for the position of provost, and was verbally assaulted in response because Dr. Steger apparently considered the idea of a black provost out of the question. Clearly, such affiliations may form the basis for actionable claims under Title VII and Section 1981.

3. *The Sixth Circuit's decision will not have the dire consequences predicted by Petitioners.*

Petitioners predict that the Sixth Circuit's interpretation of Title VII and Section 1981 in this case will give rise to unprecedented "free speech" rights in the private sector by, granting employees "absolute immunity from discipline in response to speech concerning race or gender issues." (Petition p. 21). There is no reason for concern. Under the "opposition" clauses of the various federal employment statutes (*i.e.*, Title VII, the ADA, the ADEA, the FMLA, the FLSA, etc.), employees, even private sector employees, already enjoy a measure of freedom to voice their opposition to perceived unlawful treatment.[25] Such freedom is far from unlimited. Employers may discipline or even terminate employees whose opposition activity becomes truly disruptive.[26]

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25. *See discussion in Grant v. Hazelett Strip-Casting Corp.*, 880 F.2d 1564, 1569 (2d Cir. 1989), noting that "Congress sought to protect a wide range of activity . . ."

26. *See Hochstadt v. Worcester Foundation*, 545 F.2d 222, 231 (1st Cir. 1976), upholding termination for disruptive "opposition" holding that "the purpose of the Act to protect persons engaging reasonably in activities opposing . . . discrimination, against Congress' equally manifest desire not to tie the hands of employers in the objective selection and control of personnel." Note, however, (Cont'd)

The Sixth Circuit's decision does not alter the current state of the law. The law would only be dramatically altered if Petitioners' arguments were adopted. According to Petitioners individuals employed as affirmative action directors would be unable to maintain claims for opposing unlawful discrimination because all such opposition would be considered "advocacy of affirmative action." In effect, such individuals would forfeit the right to oppose unlawful employment practices in their workplace. Such a result is at odds with the notion that Title VII protections cannot be prospectively waived.[27]

D. The Sixth Circuit properly recognized Mr. Johnson's "participation" claim because the allegations of his EEOC charge, if proven, constituted Title VII violations.

In support of their final argument, Petitioners contend that "Johnson should have known that he was not opposing Title VII violations when he was protesting what he saw as non-compliance regarding affirmative action." (Petition p. 25). However, as indicated in the Complaint, Mr. Johnson's EEOC charge alleged that he was being retaliated against as a result of his complaints about hiring and pay

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that such decisions "must be read narrowly lest legitimate activism by employees asserting civil rights be chilled." *Wrighten v. Metropolitan Hospitals, Inc.*, 726 F.2d 1346, 1355 (9th Cir. 1984) (distinguishing *Smith v. Singer Co.*, 650 F.2d 214 (9th Cir. 1981) and *Silver v. KCA, Inc.*, 586 F.2d 138 (9th Cir. 1978), cited by Petitioners).

27. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974) ("[W]e think it clear that there can be no prospective waiver of an employee's rights under Title VII.").

disparities for minority employees. (App. 98a). Obviously, disparate treatment of minorities in hiring or pay would violate Title VII. Thus, Petitioners' diatribe and citation of authority to the effect that Mr. Johnson, as a human resources professional, could not possibly have believed he was complaining about a Title VII violation, is simply misplaced, as is their contention that the Court should consider this issue.

The only actual question presented is whether Mr. Johnson in fact believed such disparities existed. If he did not, then his participation claim must fail.[28] As the Sixth Circuit properly held, Mr. Johnson's belief when he filed his EEOC charge cannot be resolved at the summary judgment stage. Thus, a jury question is presented.[29] Indeed, even Judge Kennedy, who dissented from the Sixth Circuit's panel decision on all other issues, agreed that Mr. Johnson is entitled to a trial on this issue.

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28. *See Wilson v. UT Health Center*, 973 F.2d 1263 (5th Cir. 1992) (affirming district court's dismissal of Title VII claim following bench trial finding that plaintiff made misrepresentations).

29. *See Dey v. Colt Construction & Dev. Co.*, 28 F.3d 1446, 1457-58 (7th Cir. 1994) (reversing grant of summary judgment because material issues of fact remained as to whether employee held sincere belief that supervisor's conduct constituted sexual harassment). *See also Hargens v. U.S. Dep't of Agriculture*, 865 F. Supp. 1314, 1329 (N.D. Iowa 1994); *Moyo v. Gomez*, 40 F.3d 982, 984 (9th Cir. 1994); *Benkritis v. Johnson*, 882 F. Supp. 521, 526 (D.S.C. 1995); *Trent v. Valley Elec. Ass'n*, 41 F.3d 524, 527 (9th Cir. 1994).

CONCLUSION

Petitioners have failed to raise any genuine issues of exceptional importance. Accordingly, certiorari should be denied.

Respectfully submitted,

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